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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of the Master in Equity

The Honorable Mikell R. Scarborough, Master in Equity  
Case No.: 2010-CP-10-6060

APPELLATE CASE No.: 2014-001323

Bank of America, N.A., ..... Respondent,

v.

Johnson D. Koola, First Citizens Bank and Trust Company, Inc.,  
f/k/a First Citizens Bank and Trust Company of South Carolina, and  
Cambridge Lakes Condominium Homeowners Association, Inc.,  
f/k/a Cambridge Lakes Horizontal Property Regime,

Of whom Johnson D. Koola is the ..... Appellant.

APPELLANT'S MOTION TO FILE SUPPLEMENTAL CITATIONS

Appellant files a Motion to file Supplemental Citations in the Appellate Case No. 2014-001323, Bank of America, N.A., respondent v. Koola, appellant.

Rule 208(b)(7), SCACR, allows a party to file and serve Supplemental Citations when pertinent and significant authorities come to the attention of the party. Appellant pro se depends on local public library for legal research and do not have access to *Federal Reporters and Federal Supplements*. Following leads from newspaper reports, appellant obtained information about herein cited Supplemental Citations published in

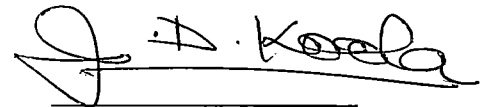
*Federal Reporters and Federal Supplements.* Appellant also cites to a Decision of the Supreme Court of South Carolina.

Supplemental Citations provide material support for the arguments presented in the appellant's Reply Brief. Each Citation makes reference to the issue presented in the Reply Brief and page numbers.

Supplemental Citation is attached to each copy of the Motion.

August 3, 2015

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. D. Koola", written over a horizontal line.

Johnson D. Koola  
1587 Cambridge Lakes Dr  
Mt. Pleasant, SC 29464  
(843) 849-9241

Appellant pro so

**THE STATE OF SOUTH CAROLINA**

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**SUPPLEMENTAL CITATIONS**

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Attorney for Respondent

## SUPPLEMENTAL CITATIONS

### CASES

Section, page numbers  
in Reply Brief

1. *Corvello v. Wells Fargo Bank, N.A.*,  
728 F.3d 878, 883 (9<sup>th</sup> Cir. 2013).....IV, pp. 16-21
2. *In re Bank of America Home Affordable Modification Program  
(HAMP) Contract Litigation*,  
U.S. Dist. Lexis 72079, 5, 11-17 (2011).....IV, pp. 16-21
3. *Sutcliffe v. Wells Fargo Bank, N.A.*,  
283 F.R.D. 533, 537-39, 540, 548, 549-53  
2012 U.S. Dist. Lexis 65274 (2012), 3-12, 15, 41-42. 45-59.....IV, pp. 16-21
4. *Terlinde v. Neely, Sr.*, 275 S.C.395, 398, 271 S.E.2d 768, 769.....II, pp. 5-10
5. *United States ex rel. O'Donnell v. Bank of Am. Corp.*,  
33 F.Supp.3d 494, 502 (2014).....III, pp. 10-15
6. *West v. JPMorgan Chase Bank, N.A.*,  
214 Cal. App. 4<sup>th</sup> 780, 792-99,  
Cal. App. Lexis 207 295-300 (2013).....IV, pp. 16-21
7. *Wigod v. Wells Fargo Bank, N.A.*,  
673 F.3d 547, 562, 564, 565, 569, 576 (7<sup>th</sup> Cir. 2012).....IV, pp. 16-21
8. *Young v. Wells Fargo Bank, N.A.*,  
717 F.3d 224, 233, 235-36 (1<sup>st</sup> Cir. 2013).....IV, pp. 16-21

### CODES and Administrative Program cited herein with page numbers

1. 12 U.S.C.A. § 1715z-23.....3, 4
2. 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1.....3
3. S.C. Code Ann. § 27-31-430.....2
4. Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").....3
5. HAMP Supplemental Directive 09-01 (April 2009), Administrative program.....4

**1. Reason to file Supplemental Citation**

Rule 208(b)(7), SCACR, allows a party to file and serve Supplemental Citation when pertinent and significant authorities come to the attention of the party. Appellant pro se depends on local public library for legal research and do not have access to *Federal Reporters* and *Federal Supplements*. Following leads from newspaper reports, appellant obtained information about herein cited Supplemental Citations published in them. Appellant also cites to a Decision of the Supreme Court of South Carolina.

**2. Citation relevant to Section II of the Appellant's Reply Brief, pp. 5-10**

In his Reply Brief, appellant stated that: (i) in February 2004 he purchased a 'converted condominium' from the developers/sellers; (ii) in June 2008, the Homeowners Association (the "HOA") initiated a construction defects lawsuit against the developers/sellers, and other parties; (iii) in July 2010, the HOA amended the Complaint in its construction defects lawsuit stating that the developers/sellers violated S.C. Code Ann. § 27-31-430; and (iv) thereupon, appellant discovered that the builders/developers falsified the 'Builder's Certification' and violated S.C. Code Ann. § 27-31-430.

**2 (i). *Terlinde v. Neely, Sr.*, 275 S.C.395, 271 S.E.2d 768**

The Supreme Court *reversed and remanded* the Trial Court's decision that a builder is not liable to a home buyer for implied warranty if the home is three years old after determining that:

- i. the latent defects in a house will not manifest themselves for a considerable period of time, *Id.* at 398, 271 S.E.2d at 769;
- ii. the ordinary buyer is not in a position to discover hidden defects in a structure, *Id.* at 398, 271 S.E.2d at 769; and

iii. the length of time for latent defects to surface should be controlled by the *standard of reasonableness and not by an arbitrary time limit [of three years] created by the Court. Id.* at 398, 271 S.E.2d at 769.

**3. Citation relevant to Section III of the Appellant's Reply Brief, pp. 10-15**

In his reply Brief, appellant argued that respondent owed appellant a Duty of Care, which was created through Federal Appraisal Guidelines found in Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1

**3 (i). *United States ex rel. O'Donnell v. Bank of Am. Corp.*, 33 F.Supp.3d 494 (2014)**

In this "*qui tam*" action<sup>1</sup>, the jury found that the named defendants are liable for fraud in violation of FIRREA, and the Court entered Judgment against, among others, Bank of America, N.A., to pay a sum of \$1,267,491,770 (\$1.27 billion). *Id.* at 502.

**4. Citations relevant to Section IV of the Appellant's Reply Brief, pp. 16-21**

In his reply Brief, appellant argued that he applied for a mortgage loan modification under "*Home Affordable Modification Program*" ("HAMP") and "*Hope for Homeowners Program*", 12 U.S.C.A. § 1715z-23, but respondent did not offer him an *affordable* loan modification.

The Troubled Asset Relief Program (TARP) established In 2008 under the Emergency Economic Stabilization Act, P.L. 110-343, 122 Stat. 3765, required the Secretary of the Treasury, among others, to facilitate mortgage loan modifications to

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<sup>1</sup> An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive. Black's Law Dictionary, Ninth Ed., 2009

prevent avoidable foreclosures. The Secretary negotiated Servicer Participation Agreements (**SPAs**) with home loan servicers who then agreed to modify the eligible loans under *non-statutory HAMP Supplemental Directive 09-01* (April 2009) and the *statutory "Hope for Homeowners Program"*. When a borrower qualified for a **HAMP** loan modification, the servicer implemented a Trial Period Plan (**TPP**) under a new loan repayment terms. After the trial period, if the borrower complied with all terms of the TPP agreement, the servicer had to offer an affordable permanent modification on the same terms as under trial period plan.

In October 2008, Bank of America accepted \$15 billion from the United States Government, an additional \$10 billion in January 2009, and a partial guarantee against losses on \$118 billion in mortgage-related assets as part of TARP program. In April 2009, it agreed to participate in HAMP.

4 (i). ***In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation***, U.S. Dist. Lexis 72079 (2011)

The plaintiffs in this action consisted of two classes: one class of homeowners was not admitted into the TPP, but argued in the Court that they are among the intended beneficiaries of SPAs and is designated as **SPA class**; another class of homeowners entered into TPP but was not given a permanent HAMP modification and is designated as **TPP class**. *Id.* at 5.

In this action, the Court *denied* Bank of America's Motion to dismiss, *inter alia*, TPP plaintiffs' Breach of Contract and Breach of the Implied Covenant of Good Faith and Fair Dealing claims, and violations of state consumer protection acts, but *granted* Bank's motion to dismiss, *inter alia*, SPA plaintiffs' Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing claims after determining, *inter alia*, that:

- i. TPP itself is an enforceable contract, TPP supplied the contractual provision allegedly breached, namely the borrower would be admitted into HAMP if he or she complied with the terms of the TPP, and every contract implies good faith and fair dealing, *Id.* at 16-17, *Id.* at 11-16; and
- ii. SPA plaintiffs are not parties to any contract because they are not the intended beneficiaries of the HAMP agreement and lack standing to bring the action. *Id.* at 8-11.

**4 (ii). *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7<sup>th</sup> Cir. 2012)**

In this leading action, the Court of Appeals for the Seventh Circuit *reversed and remanded* certain Decisions of the District Court on, *inter alia*, Breach of Contract (and Breach of Implied Covenants) for violating the TPP and Fraudulent Misrepresentation and *affirmed* certain Decisions of the District Court on, *inter alia*, Breach of SPA after determining that:

- i. The TPP terms included a unilateral offer to modify plaintiff's loan permanently conditioned on her compliance with the stated terms of the TPP, *Id.* at 562;
- ii. A TPP contract is enforceable since from its plain terms it is ascertainable what each party has agreed to do, *Id.* at 564;
- iii. HAMP guidelines provided the precise standard by which the final terms of the permanent modification were to be set, and the Bank was obligated to use the HAMP guidelines to try to bring plaintiff's monthly payments to 31 percent of the gross income, *Id.* at 565;
- iv. The economic loss doctrine does not bar plaintiff's claim for fraudulent misrepresentation, i.e. fraud, *Id.* at 569; and
- v. Federal law does not preempt plaintiffs' state law causes of action for Breach of Contract and fraudulent misrepresentations. *Id.* at 576.

**4 (iii). *Corvello v. Wells Fargo bank, N.A.*, 728 F.3d 878 (9<sup>th</sup> Cir. 2013)**

The Court of Appeals for the Ninth Circuit *reversed and remanded, inter alia*, the District Court's Decision for failure of the defendant to offer permanent mortgage modifications to plaintiff borrowers after determining that:

- i. Under HAMP, bank was contractually required to offer the plaintiffs a permanent mortgage modification after they complied with the requirements of TPP, *Id.* at 883; and
- ii. The Seventh Circuit's reasoning in *Wigod* is sound and applies to Ninth Circuit. *Id.* at 883.

**4 (iv). *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224 (1<sup>st</sup> Cir. 2013)**

The Court of Appeals for the First Circuit *vacated and remanded, inter alia*, dismissal of plaintiff's Breach of Contract claim because defendant failed to proffer a permanent modification agreement at the end of the TPP trial period. *Id.* at 235-36. The Court, however, did not express an opinion on the merits of plaintiff's argument that defendant breached TPP by requiring *higher payments* under permanent modification agreement than the payments demanded under the TPP. *Id.* at 233. On remand, the District Court dismissed the Breach of Contract claim because plaintiff violated the terms of the TPP due to late payment. *Young*, U.S. Dist. Lexis 77129 (2015) at 6.

**4 (v). *Sutcliffe v. Wells Fargo Bank, N.A.*, 283 F.R.D. 533, U.S. Dist. Lexis 65274 (2012)**

The District Court *denied, inter alia*, bank's motion to dismiss plaintiffs' Breach of Contract Claim because TPP is an enforceable contract for a permanent loan modification, *Id.* at 549-53, U.S. Dist. Lexis 65274 at 45-49 and found that:

- (i) In early 2010, bank offered plaintiffs a three-month TPP, which reduced plaintiffs' monthly payment from \$1,180.00 to \$787.71 for the three-month period, but failed to

offer a permanent loan modification at the end of the TPP. Instead, in July 2010, the bank offered the plaintiffs a special forbearance plan requiring them to pay \$1,179.31 monthly for three months, which is essentially full mortgage payments, but failed to offer a permanent loan modification at the end of the forbearance plan. In April 2011, the bank offered the plaintiffs a second special forbearance plan requiring them to pay \$867.23 per month. During the process, the bank wrote repeatedly to the plaintiffs that their loan was in default, the bank had initiated foreclosure proceedings, and a Trustee's sale was imminent. Thereupon, plaintiffs initiated the civil action. *Id.* at 537-539, U.S. Dist. Lexis 65274 at 3-12;

(ii) In March 2012, the bank offered the plaintiffs a permanent loan modification, which they accepted. Thereupon, the bank argued in the Court to dismiss plaintiff's civil action moot, which the Court denied. *Id.* at 540, 2012 U.S. Dist. Lexis 65274 at 15.

(iii) Plaintiffs, who were residents of Kansas City, Missouri and out-of-state parties, were allowed to assert California statutory claims because the relevant conduct of the bank occurred in California. *Id.* at 548, 2012 U.S. Dist. Lexis 65274 at 41-42.

**4 (vi). *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4<sup>th</sup> 780, 154 Cal. Rptr.3d 285**

The Court of Appeal of California, Fourth Appellate District, Division Three, reversed and remanded, *inter alia*, a judgment of the lower Court granting defendant's motion to dismiss plaintiff's Fraud and Negligent Misrepresentation and Breach of Written Contract claims for violation of TPP agreement. *Id.* at 792-99, 154 Cal. Rptr.3d at 295-300. The Court also found that the defendant Bank failed to provide information how the bank determined that plaintiff was ineligible to receive a permanent loan modification. *Id.* at 798, 154 Cal. Rptr.3d at 299.

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Cambridge Lakes Condominium Homeowners Association, Inc.,  
f/k/a Cambridge Lakes Horizontal Property Regime, Defendants,

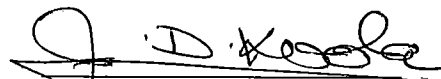
Of whom Johnson D. Koola is the..... Appellant.

PROOF OF SERVICE

I, Johnson D. Koola, Appellant *pro se*, under penalty of perjury, certify that on August 3, 2015, I mailed a Copy of the Supplemental Citations by mailing a true and accurate copy thereto to the counsel of record for the Respondent, Robert P. Jackman, Esq., Korn Law Firm, P.A., P.O. Box 12369, Columbia, SC 29211-2369.

August 3, 2015

Respectfully submitted,



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Appellant *pro se*

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